MBF HOLDINGS BERHAD

v.

EAST ASIATIC COMPANY (MALAYSIA) BERHAD

HIGH COURT MALAYA, KUALA LUMPUR
DATO' K.C. VOHRAH J
[CIVIL SUIT NO. S1-22-156 OF 1995]
23 AUGUST 1995

INJUNCTION: *Mandatory injunction - Application for delivery of vacant possession of land - Whether special circumstances exist to justify the granting thereof.*

INJUNCTION: *Prohibitory injunction - Prohibition from dealing with shares - Prohibition related to failure to deliver vacant possession of land - Relief sought disproportionate to the amount of damages that can be awarded - Whether Court should grant injunction - Principles to be applied.*

LAND LAW: *Vacant possession of land - Delivery thereof - Land occupied by defendant's former workers - Eviction of workers - Whether duty to evict lies on the former employer or the registered owner - Issues to be tried.*

By a sale and purchase agreement they had entered into, the defendant agreed to sell its Padang Meiha Estate (the estate land) to the plaintiff and had accepted as consideration thereof 72,424,058 ordinary shares of the plaintiff. The agreement stipulated that vacant possession was to be delivered on 8 March 1995 but on that date some 200 former workers of the defendant were still occupying the estate land. These workers were offered employment by the plaintiff but the offer was rejected. The plaintiff in the circumstances sued the defendant for failure to deliver vacant possession. At the same time it also applied for an injunction that the defendant deliver vacant possession and for a prohibition to prohibit the defendant from dealing with the said shares.

The defendant contended that there was already delivery of vacant possession as vacant possession was deemed to have been delivered on the completion date of the agreement. It was also the defendant's contention that the workers were on the land as trespassers, and it was therefore for the plaintiff, as registered owner, to take the necessary eviction proceedings against them.

Held:

[1] There is a serious dispute as to whether the defendant has not delivered vacant possession in accordance with the terms of the agreement. The case is not a strong and unusual case, and no special circumstances have been made out for the grant of a mandatory injunction.

[2] In addition to specifying what the defendant must do, the order should stipulate when or by when he must do it. In the instant case what the mandatory order seeks in reality is for the defendant to take eviction proceedings in one of the subordinate Courts. It will be impossible to fix a timetable within which the defendant must commence proceedings against the former workers, go for trial and recover the premises bearing in mind that eviction proceedings are by no means tidy and that appeals against the Court's decision may take place. Furthermore, damages would be an adequate remedy in the circumstances of this case and clearly the defendant would be able to afford to pay damages if the trial result is not in its favour.

[3] The practice of the Courts is to subject an application for an interlocutory prohibitory injunction to some tests to determine whether the injunction will be granted and these require the applicant to show (1) that there is a serious question to be tried, (2) if the applicant were to succeed at the trial, damages would not be adequate compensation for his loss, (3) the balance of convenience lies in his favour, and (4) there are special circumstances in his favour or no special circumstances in favour of the respondent.

[4] Whether the workers were the defendant's employees or not, is not only a matter of interpretation of the relevant employment law but also a matter of evidence whether the defendant had repudiated its contract with its employees. These are serious issues to be tried.

[5] What the prayer seeks to do is to prevent the defendant from dealing with these shares over a problem relating to vacant posession of the estate land which is no more the defendant's property but the plaintiff's subsidiary. The relief sought to freeze dealings in shares worth more than RM115,000,000 is inordinately disproportionate to the amount of damages that can be claimed and it will be highly unconscionable for the Court to grant it.

[Application dismissed with costs]

Cases referred to:
American Cyanamid Co. v. Ethicon [1975] 1 ALL ER 504 ***(refd)***
Keet Gerald Francis Noel John v. Mohd. Nor [1995] 1 CLJ 27 ***(refd)***
Shepherd Homes Ltd v. Sandham [1971] Ch 340 ***(refd)***
Locabail International Finance Ltd. v. Aqroexport [1986] 1 WLR 657 ***(refd)***
Jakeman v. South West Thames Regional Health Authority [1990] IRLR 62 ***(refd)***
Temporal v. Temporal [1990] 2 Fam LR 80 ***(refd)***

Other source referred to:
Injunctions In General, L.A. Sheridan, 1994 Edn. p. 1

For the plaintiff - Loh Siew Cheang (P. Jayasingam & Loo Foong Meng with him); M/s. Cheang & Ariff
For the defendant - Tommy Thomas (S. Selvaratnam with him); M/s. Skrine & Co.

JUDGMENT

K.C. Vohrah J:

The plaintiff (MBf) has sued the defendant (EAC) for specific performance of a sale and purchase agreement (S&P) entered into between themselves in that vacant possession of the sale lands (the estate land) be delivered by EAC to MBf. There is a claim for damages for breach of the S&P and costs. EAC in its defence alleges that vacant possession of the estate land was delivered to MBf on 8 March 1995 within the meaning of the S&P and counter claims for several declarations relating to 72, 424, 058 ordinary shares in MBf (which formed the consideration for the sale of the estate land), general damages for breach of contract, special damages, interests and costs.

MBf in this summons-in-chambers has filed for injunctive reliefs, one to restrain EAC from dealing with the shares and the other to order EAC to do all acts necessary to deliver vacant possession of the estate land MBf purchased, Padang Meiha Estate, in Kedah under an S&P dated 9 March 1994 from EAC. The purchase price was RM115,878,492. This consideration, however, was to be satisfied in kind through the issue of the requisite number of MBf shares at 50 sen each at an issue price approved by the security commission.

It was an unusual agreement as no deposit was payable to EAC upon execution of the S&P.

The shares, 72,424,058 new ordinary shares have been issued, listed and quoted in the Kuala Lumpur stock exchange; they were listed on 8 March 1995 and that date pursuant to the S&P is the completion date of the S&P. The estate land has on the other hand been transferred to a nominee and subsidiary of MBf, Glocard Sdn. Berhad.

There is, however, a fundamental problem relating to the estate land which has so far defied 3 resolution. The Padang Meiha Estate comprises 5082.4 acres and at the moment 200 persons, according to Encik Tommy Thomas for EAC, who formerly worked in the said estate are occupying quarters in about 50 acres of land in the said estate.

On 9 March 1995 Glocard Sdn. Bhd acting on behalf of MBf issued a circular letter to 460 employees of EAC in the said estate offering them employment on terms and conditions no less favourable than those enjoyed by them until such offer. 441 did not accept the offer and 200 of these 400 persons are the persons who are occupying the quarters in the estate.

MBf contends that EAC did not, as agreed in the S&P, deliver vacant possession of the estate land on completion date and wants these workers removed; it prays for an interlocutory injunction requiring EAC "to forthwith do all acts necessary to deliver forthwith to the plaintiff vacant possession" of the estate land.

The other injunction prayed for is a negative interlocutory injunction directed at EAC prohibiting it from dealing with the shares that had been issued to EAC - in these terms, "selling, disposing of, transferring, parting with, assigning and/or otherwise dealing with the shares issued and alloted by the plaintiff to the defendant ... until vacant possession is granted."

Some reminders on some simple principles relating to injunctions are useful.

First, an injunction is an order of the Court forbidding the initiation or the continuance of some act or state of affairs or commanding that an act be done (see Kerr, *Injunctions;* Spry, *Equitable Remedies;* Sharpe *Injunctions and Specific Performance* - quoted in L.A. Sheridan, *Injunctions In General*, 1994 Edn. Barry Rose, Law Publisher Ltd. p. 1).

An injunction which forbids doing or going on doing an act, for example trespass on the plaintiff's land by parking cars there, is prohibitory. An order which directs the defendant to do something to repair an omission, or, to restore the prior position by undoing a wrongful act such as building in breach of a restrictive covenant, is a mandatory injunction (see Sheridan, *ibid*, p. 1).

For our purposes the injunction sought by MBf against EAC to do all acts to deliver vacant possession of the estate is a mandatory injunction.

Normally, since the case of *American Cyanamid Co. v. Ethicon* [1975] 1 All ER 504 at p. 510 the practice of the Courts is to subject an application for an interlocutory injunction to some tests to determine whether an interlocutory injunction will be granted and these require an applicant to show that:

1. there is serious question to be tried;
2. if the applicant were to succeed at the trial, damages would not be adequate compensation for his loss;
3. the balance of convenience (or lately, the balance of justice) lies in his favour;

4. there are special circumstances in his favour or no special circumstances in favour of the respondent.

Additionally, the granting of an interlocutory injunction is subject to the usual equitable considerations.

These principles have been subject to various interpretation or clarification by English and Malaysian cases including the recent case of *Keet Gerald Francis Noel John v. Mohd. Nor* [1995] 1 CLJ 27.

The ordinary *American Cyanamid* principles are not applicable in an application for a mandatory injunction. In the case of a mandatory interlocutory injunction for its grant there must be a high degree of assurance that at the trial it will appear that the injunction was rightly granted (*Shepherd Homes Ltd. v. Sandham* [1971] Ch 340; *Locabai1 International Finance Ltd. v. Aqroexport* [1986] 1 WLR 657). This is far more than is required for a prohibitory injunction to which the *American Cyanamid* principles apply. As put by L.A. Sheridan (*ibid*, p. 35).

> That may be no more than a way of saying that the balance of convenience is more often against a mandatory injunction than it is against a probihitory injunction at the interlocutory stage because an interlocutory mandatory injunction is more likely to involve the defendant in expenditure, more likely to be the final determination of the dispute and more difficult to compensate if the defendant wins at the trial.

In *Jakeman v. South West Thames Regional Health Authority* [1990] IRLR 62, Auld J said that in the absence of special circumstances an interlocutory mandatory injunction would not be granted unless the case was clear and one which should be decided at once.

To turn back to MBf's application for the mandatory injunction to compel EAC to take all necessary steps to deliver, vacant possession, let me say that there is serious dispute as to whether EAC has not delivered vacant possession in accordance with the terms of the S&P. EAC contends that vacant possession in the context of various clauses in the S&P was deemed to have been delivered on completion date after which EAC with the consent and knowledge of MBf proceeded to manage the estate for MBf notwithstanding that MBf, although obliged to execute a management agreement with it, refused to execute it. EAC points to a considerable amount of correspondence and other documents to show that EAC by conduct managed the estate and that vacant possession was deemed delivered. EAC also points out that an audit check was carried out by MBf on 7 March 1995 to facilitate handing over of possession on 8 March 1995 and that vacant possession was completed on 8 March 1995.

Then again MBf contends that the former workers of the estate who are now in 50 acres of the estate land should be removed by EAC as they are EAC's employees. This is disputed by EAC who say the workers are no longer EAC's employees but are trespassers on the estate land of the registered owner and it is for the registered owner to evict these trespassers. Whether they are EAC's employees is not only a matter of interpretation of the relevant employment law but also a matter of evidence whether EAC had repudiated its contract with its employees. If they are not EAC's employees then who evicts them from the land which no longer belongs to EAC? These too are serious issues to be tried.

Clearly, therefore, to my mind, there are serious disputes as to facts which need to be resolved at trial and the case is not a strong and unusual for me to grant the mandatory injunction sought for. Again no special circumstances have been made out for me to grant

the mandatory injunction sought for. It has also to be borne in mind that to grant the injunction would mean giving the whole relief it has claimed in the action and that is discouraged.

As is pointed out by L.A. Sheridan (*ibid*, p. 15) in regard to a mandatory injunction, in addition to specifying what the defendant must do, the order should stipulate when or by when he must do it. There is no power to commit a person to prison for contempt of Court for disobedience to an injunction requiring him to do an act unless he refuses or neglects to do it at or within the time fixed by the judgment or order or by any subsequent order (see *Temporal v. Temporal* [1990] 2 Fam LR 80). In the instant case what the mandatory order seeks in reality is for EAC to take eviction proceedings in one of the subordinate Courts in Kedah. It will be well nigh impossible to fix a time table within which EAC must commence proceedings against the former workers, go for trial and recover the premises bearing in mind that eviction proceedings are by no means tidy and that appeals against the Court's decision may take place. A mandatory injunction is clearly not suitable.

Finally, in my view, damages (see discussion later) would be an adequate remedy in the circumstances of this case and clearly EAC would be able to afford to pay damages if the trial result is not in its favour.

I now come to the prayer for the prohibitory injunction to restrain EAC from dealing with the shares.

Here I would need to go back to principles set out in the *American Cyanamid* case. As pointed out the applicant is required to show that there is a serious question to be tried. The next step to consider is the inadequacy of damages and this is what is said in the case as regards that (p. 510):

> ... The governing principle is that the Court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of continuing to do what was sought to be enjoined between the time of the application and the time of the trial.
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> If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff ... the Court should then consider whether, on the contrary hypothesis that if the defendant were to succeed at the trial ... he would be adequately compensated under the plaintiff's undertaking as to damages ... If damages in the measure recoverable under such an undertaking would be adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.

In so far as the instant case is concerned the shares at the time of issue were worth millions of ringgit, RM115,878,492.

What the prayer seeks to do is to prevent the defendant from dealing with these shares over a problem relating to vacant possession of the estate land which is no more EAC's property but that of MBf's subsidiary Glocard. Assuming development work cannot take place, as claimed, on the 5082.4 acres of land less 50 acres occupied by the trespassers (but taking into account that MBf must take steps to mitigate losses), would damages resulting from the delay in evicting the trespassers amount to RM115,878,492? Even assuming that it is decided after trial that EAC should give vacant possession of the estate

land, and that would mean EAC would have to take eviction proceedings whereupon MBf would be entitled to damages for breach of contract less the costs to be incurred by EAC for the eviction proceedings, the damages that would be awarded would not amount to more than a pinprick in terms of a percentage of the total value of the shares issued to EAC. The relief sought to freeze dealings in shares worth more than RM115,000,000 is inordinately disproportionate to the amount of damages that can be claimed and it will be highly unconscionable for the Court to grant it.

In all the circumstances of the cases I dismiss the application for the injunctive reliefs with costs.